

Pennsylvania's Environmental Rights Amendment: Solutions for Navigating an Uncertain Legal Landscape

Sophia Lee, Esq.
Frank L. Tamulonis, Esq.
Stephen C. Zumbrun, Esq.

March 13, 2018

The Environmental Rights Amendment

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, **including generations yet to come**. As trustee of these resources, **the Commonwealth** shall conserve and maintain them for the benefit of all the people.”

Pa. Constitution, Article I, Section 27 (1971) (emphasis added).

Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973)

Established a three-part test to determine whether government action violates the ERA:

- Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
- Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Robinson Township v. Commonwealth, 83 A.3d 901 (Pa. 2013)

Background:

- Act 13 signed into law by Gov. Tom Corbett in February 2012.
 - Section 3303 - Preempted and superseded local regulation of oil and gas operations.
 - Section 3304 - Required statewide uniformity among local zoning ordinances.
 - Section 3215(b)(4) – Automatic waiver by DEP of water setbacks.

Parties:

- Multiple municipalities, NGO v. Commonwealth, DEP, PUC.

Commonwealth Court Decision:

- Held Act 13 unconstitutional in part and enjoined application.
- Direct cross-appeals by the parties were filed with Supreme Court.

Robinson Township, Cont. – Lead Opinion’s Analysis of ERA

- Plain Language Analysis of ERA:
 - **First Clause of ERA**: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”
 - Limits all levels of government’s power to act contrary to this right.
 - Laws that unreasonably impair this right are unconstitutional.
 - **Second Clause of ERA**: “Pennsylvania's public natural resources are the common property of all the people, including generations yet to come.”
 - **Third Clause of ERA**: “As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”
 - All branches of government are Trustee.
 - Fiduciary duty to prevent and remedy degradation, diminution or depletion of natural resources.

Robinson Township, Cont. – Lead Opinion

- Invalidated portions of Act 13 as unconstitutional under the ERA.
 - “Act 13 commands municipalities to ignore their obligations under [ERA].”
 - Permitting industrial use in every zoning district degrades corpus of the trust.
 - Act 13 provided inequitable treatment of beneficiaries.
- Criticized the previously established *Payne v. Kassab* test by stating it diverges from a plain reading of the ERA.
- Economic development is permitted, but “cannot take place at the expense of an unreasonable degradation to the environment.”

Justice Baer's Concurrence and Dissenting Opinions

- Justice Baer's Concurrence
 - Concurred with the Lead Opinion that Sections of Act 13 were unconstitutional.
 - Based reasoning on violation of substantive due process.
- Justice Saylor's and Justice Eakin's Dissenting Opinions
 - Legislature is primary branch in fulfilling Trustee role.
 - Commonwealth should be the Trustee under ERA and not municipalities.
 - Act 13 was within the police powers of the Legislature.

Back to *Payne*...

- *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Commw. Ct. 2015).
- *Feudale v. Aqua Pennsylvania, Inc.*, 122 A.3d 462 (Pa. Commw. Ct. 2015).
- *Kretschmann Farm, LLC v. Cardinal PA Midstream, LLC*, 131 A.3d 1044 (Pa. Commw. Ct. 2016).
- *Funk v. Wolf*, 144 A.3d 228 (Pa. Commw. Ct. 2016).
- *Delaware Riverkeeper Network, et al. v. R.E. Gas Development, LLC*, 2017 Pa. Commw. Unpub. LEXIS 415 (Pa. Commw. Ct. 2017).

Pennsylvania Env'tl. Def. Found. v. Commonwealth, 161 A.3d 911 (Pa. 2017)

Background:

- 1955 - Oil and Gas Lease Fund Act established a Lease Fund for rents and royalties of oil and gas leases to be used for conservation purposes.
- Between 2008-2014 Fiscal Code Amendments reappropriated money away from the Lease Fund to other uses and limited funds to DCNR.
- PEDF filed action that Fiscal Code Amendments violated the ERA. The Commonwealth Court held there was no violation.

Pennsylvania Env'tl. Def. Found., Cont.

Supreme Court's Decision:

- Court rejected the *Payne v. Kassab* test.
- Courts should be guided by text of the ERA and underlying principles of Pennsylvania trust law.
 - Commonwealth has a duty to prohibit degradation, diminution and depletion of our public natural resources.
- Public trust provisions of the ERA are self-executing.
- Fiscal Code Amendments violated the ERA.

Center for Coalfield Justice and Sierra Club v. DEP and Consol Pennsylvania Coal Company, 2017 Pa. Environ. LEXIS 52 (Aug. 15, 2017)

- Environmental Hearing Board invalidated a DEP permit authorizing longwall mining.
- Compliance with DEP’s regulations is not necessarily indicative of compliance with the ERA.
- Balancing test: The DEP must weigh the environmental effects of any decision and consider whether the decision is likely to cause “unreasonable degradation or deterioration of the environment.”
- “Reasonableness” depends on the expected benefits of any decision.

Back to *Payne*...

- In addition to compliance and reasonable efforts to reduce environmental incursion, courts need to ask:
 - Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Cases to keep an eye on...

- *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, No. 225 CD 2015
- *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, 2018 WL 943041 (Pa. Commw. Ct. Feb. 16, 2018).
- *Gorsline v. Board of Supervisors*, 123 A.3d 1142 (Pa. Commw. Ct. 2015), *appeal granted* 139 A.3d 178 (Pa. 2016).
- *The Delaware Riverkeeper, et al. v. DEP and R.E. Gas Development, LLC*, EHB Docket 2014-142-B (Consolidated).
- *Hudson, et al. v. DEP and Country View/CFC Fulton*, EHB No. 2015-116-L (Consolidated).
- *Siri Lawson v. DEP and Hydro Transport, LLC*, EHB Docket No. 2017-051-B.

Project Proponents Should:

- Assume that your project will be under the microscope by NGOs and regulators from the start
- Assume that NGOs, landowners, and municipalities will use ERA to challenge project
- Engage your experts early: legal, technical, communications, public relations
- Consult regularly to establish a record that would pass muster under the ERA
 - Obtain and comply with all permits
 - Establish close relationships with local communities and regulators
 - Emphasize the environmental and economic benefits of the project

Please send us your questions!

Sophia Lee, Esq.

(215) 569-5641

SLee@BlankRome.com

Frank Tamulonis, Esq.

(215) 569-5725

ftamulonis@BlankRome.com

Stephen Zumbrun, Esq.

(215) 569-5467

szumbrun@BlankRome.com

BLANKROME